IN THE

Supreme Court of the United States

October Term, 1970

Supreme Court, U.S.
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No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. MCELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMISKEY, and CORNELIUS A. CUMMISKEY,
Appellants,

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,
Appellees.

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island,
Appellants,

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,
Appellees.

On Appeal from a Three-Judge United States District Court for the District of Rhode Island

BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

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Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

Statement of the Case

This proceeding was started in the U. S. District Court for the District of Rhode Island by a complaint challenging the constitutionality of the Salary Supplement Act adopted by Rhode Island, effective July 1, 1969, R.I. Gen. Laws, Chap. 1651. The statute provides for underwriting by the state of up to 15% of the salaries of those persons teaching grades 1-8 in church-related and other private schools who are teaching subjects required by state law to be taught in public schools or other subjects taught in public schools, and using materials used in the public schools.

The three-judge court which was duly convened held unanimously that the state violated the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment. This appeal followed.

The Questions to Which This Brief Is Addressed

This brief is addressed to two questions. One is whether the Rhode Island statute under consideration in this litigation, which provides for the payment of part of the salaries of teachers in sectarian religious institutions, violates the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment. The

second question to which this brief is directed is whether the State of Rhode Island, by adopting a statute providing for payment of state funds to be used to pay teachers' salaries in sectarian religious schools has violated the prohibition against state discrimination among religions embedded in the First Amendment.

Summary of the Argument

The Rhode Island statute here under consideration violates the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment, because it provides for the use of state funds to pay a portion of the teacher salary costs of religious institutions, an essential part of the educational operations of such institutions. As the statute in question makes clear, the purpose of such aid is to make it possible for the nonpublic schools of the state, including sectarian religious schools, to continue to operate as schools. Such state financing of the educational operations of a sectarian religious school cannot be justified under the child benefit theory since even that theory does not authorize the use of state funds in aid of a sectarian religious institution, whether educational or not. Furthermore, the purpose and primary effect of the statute in question is clearly to allocate state funds to help keep alive a system of sectarian religious schools, necessarily an aid to the religious institutions which maintain those schools and to their religious purposes. In addition the financing of some of the costs of church-affiliated schools will necessarily result in an excessive government entanglement with religion which the Establishment Clause of the First Amendment prohibits.

The statute in question has still another vital constitutional defect since, by providing for state support of institutions which discriminate in admissions and in their operations on the basis of religion, it violates the prohibition against discrimination among religions, the ban on aid to one religion or preference of one religion over another embedded in the religious clauses of the First Amendment. Unless the religious schools in question cease to be religious schools, cease to give preference in admissions and in their practices to children adhering to the sect which operates the schools, the effect of such aid would necessarily be to facilitate discrimination among those receiving assistance from such aid on the basis of religion and, where there is a relationship between religion and race, race also.

Argument

The undersigned organizations all joined in a brief *amicus curiae* in one of the cases to be argued together with the instant case (*Lemon* v. *Kurtzman*, No. 89), which raises much the same issues as are here involved. We therefore refrain from repeating the arguments there made. This brief is confined to a short statement of the reasons why we believe that the arguments made in the other brief apply to this case (Point One) and our argument that the Rhode Island statute, by financing institutions that discriminate on the basis of religion, violates the concept of equality embedded in the Establishment Clause. (Point Two.)

POINT ONE

The statute, in operation, violates the Establishment Clause of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth.

The issue in this case is simple. A state statute finances in part one of the necessary expenses—teachers' salaries—of educational institutions that are established by religious institutions and foster religious tenets. On its face, this arrangement clearly violates the oft-repeated statement by this Court in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947), that the Establishment Clause of the First Amendment means at least that

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

That statement was reaffirmed most recently by this Court in *Board of Education* v. *Allen*, 392 U. S. 236, 242 (1968).

The court below declared that this statement "cannot be applied in such a literal manner" as to bar appropriation of tax monies for employees of religious institutions (App. 38). We submit, however, that there is no authority for the view that the quoted sentence means anything less than what it says.

The court below suggested that the decisions in *Everson* and *Allen* show that some forms of support are permissible (App. 38). In the *Everson* case, however, where this Court

upheld use of state funds to provide transportation for children attending parochial schools on the ground that transportation was for the physical welfare of the child rather than an educational benefit, it went on to say that the arrangement there approved "approaches the verge" of the state's power to legislate for the general welfare (330 U. S. at 16). Here there is no question that the subsidy given pays for an aspect of the educational operations of religious institutions without which they could not exist as a school. If bus transportation approaches the "verge" of what is permissible, financing of a school's educational operations plainly violates the prohibition.

In *Allen,* this Court based its decision on its conclusion that no aid was given "to parochial schools, and the financial benefit is to parents and children, not to schools" (292 U. S. at 243-4). Here, the stated purpose of the statute is to benefit the nonpublic schools. The legislative findings contained in Section 1 of the statute make it clear that it was explicitly designed to make it possible for the nonpublic schools of the state to continue their operations.

Even if the legislative findings were not in Section 1 of the statute, it is respectfully submitted that the conclusion in *Allen* upholding the aid there given on the ground that it was given for the financial benefit of parents and children is invalid. The argument that aid given to the children is not aid to the school and therefore does not violate the prohibition of the First Amendment against public aid to sectarian institutions, if interpreted to sustain the granting of educational aids to sectarian organizations, makes the constitutional ban on such aid meaningless.

This theory, the "child benefit theory," was advanced originally by those defending the constitutionality of an Oregon state law providing free textbooks at state expense to children attending parochial schools. This statute was invalidated by the Oregon Supreme Court under the Oregon State Constitution. *Dickman* v. *School District,* 232 Ore. 238 (1961), cert. den. 371 U. S. 823.

The Court's opinion in that case noted that the difficulty with the "child benefit theory" was that "unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are a benefit to the pupil" (p. 250). It was a realization by the Oregon Supreme Court that, under the "child benefit theory," the state could provide religious texts to sectarian schools on the ground that a child who attends such a school is benefited by receiving a religious education that led the Court to reject the theory.

It is clear from the foregoing that even the most wholehearted supporters of the child benefit theory must agree that a line must be drawn somewhere between the aid which the state may grant to children in sectarian religious schools and aid which it may not give because of the prohibition against the use of public funds in aid of sectarian education.

This proposition was succinctly stated by Rhode Island Superior Court Judge Fred B. Perkins in *Bowerman* v. *O'Connor* (Superior Ct., Providence, R.I., Sept. 19, 1967, Equity #31775), when he said, "Indeed what could be more in the nature of a 'child benefit' * * * than furnishing funds toward the construction of the school building itself? Yet this has never been countenanced for religious schools.

The Court is persuaded that the line must in any case be drawn at the entrance to the school." (p. 31)

In *Everson,* as has been noted above, this Court drew such a line. It stressed that transporting children to and from school at state expense, which it was upholding, is "separate and * * * indisputably marked off from the religious function" of the school (p. 18). When it went on to make it clear that the bus transportation aid it was upholding approached the verge of the state's constitutional power under the First Amendment, it was indicating that assistance to children attending parochial schools more closely related to the religious function of the schools (which cannot be disassociated from its education function) would clearly pass over the borderline separating lawful assistance given to children attending all schools to preserve their health and safety from unconstitutional assistance given to the educational functions of the sectarian religious school.

Obviously, the use of public funds to pay part of the teaching costs of a parochial school is an integral part of the educational function and process in such schools. It can hardly be argued that such assistance is provided to preserve the health, safety and physical welfare of the pupils. And it is clear that such payments serve the religious objectives of the school since they shift from the shoulders of the religious institution maintaining the school to the shoulders of the state an important part of the cost of carrying out the educational functions of the school.

Even if we ignore what this Court said in *Everson* and the necessary limits of the "child benefit theory" and con-

sider only "the purpose and the primary effect of the enactment" (*Abington School District* v. *Schempp,* 374 U. S. 203, 222 (1963)), the result is the same, as the court below held. Whether we consider purpose or primary effect, the Rhode Island statute falls under the *Schempp* test. It would be strange indeed if a statute which was enacted in order to keep alive a system of nonpublic church-affiliated schools were held to be exclusively secular in either purpose or primary effect.

The record in this case leaves no doubt that the schools aided by the Rhode Island program are part of a religious institution, the Catholic Church. Regardless of the nature of the instruction given by the teachers involved in the program, the schools are still instruments for the propagation of religion. There is no suggestion that the nature, amount or intensity of that aspect of the schools' curricula has been changed. A statute that is designed to, and does, enable such schools to operate, we submit, is religious in purpose and effect.

Finally, the financing of church-affiliated schools under the Rhode Island statute results in "an excessive government entanglement with religion" which this Court has said the Establishment Clause prohibits. *Walz* v. *Tax Commission,* 397 U. S. 664, 674 (1970). The fact that the monetary transactions take place between the state and the teachers rather than between the state and the school does not significantly reduce the amount of entanglement. The arrangement is equivalent, for all practical purposes, to "a direct money subsidy." What the teacher receives from the state because he is a teacher in the religious

school is money the school need not pay him. And he receives it only so long as he is kept as a teacher by the school. Thus it results in "a relationship pregnant with involvement" which encompasses "sustained and detailed administrative relationships for enforcement of statutory and administrative standards" (397 U. S. at 675). The subsidies, as Justice Harlan points out in his concurring opinion in *Walz,* "must be passed on periodically and thus invite * * * political controversy * * *" (397 U. S. at 699).

Both of the evils that arise out of subsidies of religious institutions—political controversy over appropriations and government involvement in administration—are present here. The record in this case makes it clear that it would be the church and the church schools that would be the suppliants at the legislature's door for each appropriation (App. 59-67, 87-88). In view of its position that the amount of aid given in 1969 was "quite small" (App. 67), it may be assumed that the Church will be directly involved in "political controversy" as to the extent and form of aid to be given, each time the legislature meets. It would not be the teachers with whom the legislature and public officials would be dealing but the schools and the religious institutions that maintain them.

With respect to administrative involvement, appellants urge that the state's principal dealings under the statute are with the teachers. Thus, the appellants in No. 569 state that "The principal administrative relationships created by the Act are between the State officials and individual teachers, and the involvement between government and religious institutions is, at most, minimal" (Brief, p. 15).

Examination of the statute refutes the statement. Section 16-51-2, subdivision 1, limits application of the statute to nonpublic schools on the basis of their annual expenditures. Manifestly this requires examination by the state of the school's records. Subdivision 2 of that section limits payment to teachers on the basis of what they teach in the school, again requiring examination of the school by the state. Similar requirements appear in paragraphs 1 and 4 of Section 16-51-3. Section 16-51-5 requires the state to audit financial records of the nonpublic schools to insure that the teacher is receiving a specified minimum salary. The same section requires that the school "comply with the provisions contained in title VI of the civil rights act of 1964." We discuss this provision further below, but we point out here that it manifestly requires supervision by the state of both the admission practices and the employment practices of the affected schools. This conclusion is reinforced by the regulations adopted by the Rhode Island Commission of Education under the statute which require *inter alia*, a number of reports by the schools, but not by the teachers, on the nature of their operations (App. 173-174).

We submit that the financial aid given under the Rhode Island statute to schools operated by religious institutions is in plain violation of the Establishment Clause of the First Amendment.

POINT TWO

The statute, by providing for state support of institutions which discriminate on the basis of religion, violates the prohibition against discrimination among religions embedded in the First Amendment.

Circuit Judge Hastie, dissenting in *Lemon* v. *Kurtzman*, 310 F.Supp. 35, 52 (E.D. Pa., 1969), now before this Court on appeal (No. 89, 1970 Term), said:

> * * * In schools with such a [religious] mission it is appropriate, practically unavoidable, that admission policies and practices reflect a preference for enrollment of children of the sponsoring faith, though not necessarily excluding all others. Yet, once the state joins in financing such education, the mandated equalitarian position of the state must result in state imposition of strictly non-discriminatory admission standards consistent with public duty, whatever sacrifice of appropriate religious objectives may result.

We submit that the equalitarian mandate referred to by Judge Hastie renders the scheme of the Rhode Island statute unconstitutional.

It is well settled that the Equal Protection Clause of the Fourteenth Amendment applies to all operations that constitute action by the state. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). It has been repeatedly held that institutions whose operations are subsidized in part by the state must meet the required constitutional standard of equal protection. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *Kerr* v. *Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir., 1945), cert. den. 326 U. S. 721 (1945).

If the schools benefiting under the Rhode Island statute were to discriminate in admissions on the basis of race, there would be a clear violation of the requirements of the Equal Protection Clause. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Sipuel* v. *Oklahoma,* 332 U. S. 631 (1948); *Kerr, supra*; *Hirabayashi* v. *United States,* 320 U. S. 81 (1943). The constitutional mandate of equality applies with the same force, we submit, to state action that discriminates on the basis of religion.

Thus, in *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100 (1947), this Court said

> Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power. * * *

In *Niemotko* v. *Maryland,* 340 U. S. 268 (1951), this Court found that use of a public park, normally open to religious groups, had been discriminatorily denied to a particular religious group although other religious activities had been allowed. It concluded that "the completely arbitrary and discriminatory refusal to grant the permit was a denial of equal protection" (at 273).

It is true that the complaint herein does not allege that the challenged statute denies equal protection of the law in violation of the Fourteenth Amendment. However, the concept of equal protection is not confined to that amendment. It is embedded likewise in the Establishment Clause

of the First Amendment which, this Court has held, prohibits state action discriminating among religious groups. Thus, this Court said in the *Everson* case, 330 U. S. at 15, that, under the Establishment Clause, "Neither a state nor the Federal Government can * * * pass laws which aid one religion, aid all religions, or prefer one religion over another." The Court went on to say (at 16):

> [The State] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

The condemnation of discrimination among religions in the *Niemotko* case was rested on freedom of religion as well as equal protection concepts (340 U. S. at 272). This double basis is even clearer in *Fowler* v. *Rhode Island*, 345 U. S. 367 (1953), which reached the same result on similar facts. Indeed, in that case, this Court emphasized the guarantees of the First Amendment as made applicable to the states by the Fourteenth. This caused Justice Frankfurter to note that he concurred in the opinion of the Court except to the extent that it relied upon the First Amendment. He said that, for him, "it is the Equal-Protection-of-the Laws Clause of the Fourteenth Amendment that condemns the Pawtucket ordinance as applied in this case" (at 70).

It would be contrary to the public policy manifested in many recent Federal and state statutes to bar discrimination based on race and allow discrimination based on religion. Thus, the prohibition of discrimination in places of public accommodation and employment in Titles II and VII

respectively of the Civil Rights Act of 1964 (42 U.S.C. Secs. 2000a to 2000a-6 and Secs. 2000e to 2000e-15) and the prohibition of discrimination in housing in Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Secs. 3601 to 3619) all apply to discrimination based on race, religion and national origin. Virtually all of the antidiscrimination laws enacted in the past 25 years in the various states have used the same formula.

Here, however, we have a statutory scheme which permits institutions receiving state support to discriminate on the basis of religion but not on the basis of race. The statute provides in Section 16-51-5 that the regulations issued thereunder shall insure that any affected nonpublic school employing teachers who receive salary supplements under the statute "shall comply with the provisions contained in title VI of the civil rights act of 1964" and, accordingly, the regulations require the principal in each school having teachers who apply for aid to certify that the school complies with Title VI (App. 174). That Title (42 U.S.C. Secs. 2000d to 2000d-4) prohibits institutions receiving any form of aid from the Federal Government from discriminating "on the ground of race, color, or national origin" (42 U.S.C. Sec. 2000d). Thus, the Rhode Island statute* and regulations leave the af-

* Other Rhode Island statutes do not apply. There is no ban on discrimination in admissions by nonpublic schools and the state fair employment law (Rhode Island General Laws, Sec. #28-5-1 to 28-5-39) exempts religious, educational and nonsectarian institutions (Sec. 28-5-6, par. (B)).

The question might also be raised whether a provision which would bar sectarian schools which do discriminate on the basis of religion in admissions or in their educational practices from receiving the aid given by the statute would not put the State of Rhode Island in the position of denying religious freedom guaranteed under the First Amendment to such institutions.

fected schools free to discriminate on the basis of religion.*

The record in this case does not reveal the admissions policies of the parochial schools affected by the statute, other than a suggestion in the Diocesan Handbook of School Regulations that preference should be given to "a child whose parents support the parish" (App. 223). There is testimony that "substantially most" of the children at the schools are Roman Catholics (App. 73). It may be assumed that in none of these schools is admission formally restricted to children of Catholic parents. It is clear, however, that it is restricted to children of parents who are prepared to have their children receive instruction in the Catholic faith and participate in Catholic religious observances. This follows from the fact that religious instruction is a part of the curriculum of the parochial schools in the Diocese for all children in the schools (App. 78-81, 104), the fact that daily prayers are recited in all classes (App. 77, 79-80, 105), and the fact that all children attend assemblies which include religious programs (App. 83-84, 85). The principal at one school testified, "I do not believe we have any non-Catholics at the schools" (App. 106).

Restriction of admission to those who are prepared to conform to the practices of a particular religion and accept instruction in its tenets is discrimination on the basis of religion. Both the Equal Protection Clause and the Estab-

* Appellants in No. 569, in referring to Title VI (Brief, p. 54, n. 54), cite 42 U.S.C. Sec. 2000e, rather than 2000d. Sections 2000e to 2000e-15 embody Title VII of the 1964 Act, not Title VI. Title VII prohibits discrimination in employment on the basis of religion as well as race and national origin. It should be noted also that Title VI covers admission practices as well as employment.

lishment Clause would prohibit such a restriction in any public institution. We submit that the prohibition applies also to institutions that accept government financing of vital aspects of their operations.

The foregoing makes clear another aspect of violations of the prohibition against discrimination which would flow from the use of public funds to pay portions of the costs of operation of sectarian religious schools. Clearly such schools, in the exercise of their function of strengthening religious indoctrination and educating their pupils in the need to accept and believe in the religious precepts which gave rise to the creation of such schools, could give preference in admission to children of that faith. And as does happen where some religious faith groups consist largely of members of one racial group or where the religious dogmas adhered to by that religious group reflect a relationship between religion and race, as for example is the case with Mormons and certain non-evangelical religious groups, the effect of aid to such religious schools would necessarily be to facilitate discrimination on the basis of race in access to the state aid given to such a school even though the school's purpose is that of giving preference to adherents to the particular religious group which operates the school. This might not only offend against the First Amendment ban on preference to any religion but also against the Fourteenth Amendment ban on denial of equal protection of the laws.

Conclusion

We respectfully submit that, for the reasons stated above, the decision of the court below should be affirmed.

Respectfully submitted,

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